1977

Bills' Roofing, Inc. v. Salt Lake City School District : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

BILLS' ROOFING INC., Plaintiff-Respondent, vs. SALT LAKE CITY SCHOOL DISTRICT, Defendant-Appellant.	)	Case No. 15346

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, Honorable Ernest F. Baldwin, Jr., Judge

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STATEMENT OF KIND OF CASE

This is an action brought by plaintiff roofing company against the defendant school district based upon an alleged breach of contract concerning the roofing of a local high school.

DISPOSITION IN LOWER COURT

A trial was held before the Honorable Ernest F. Baldwin, Jr., District Judge of the Third Judicial District. The case was submitted to the jury on special interrogatories and a judgment was subsequently entered in favor of plaintiff in the approximate sum of $14,000.

RELIEF SOUGHT ON APPEAL

Defendant-appellant seeks a reversal of the trial court judgment and an order by this Court finding in favor of defendant as a matter of law. In the alternative defendant seeks

a new trial.

STATEMENT OF FACTS

This is an action commenced by plaintiff against the Salt Lake City School District for defendant's alleged breach of contract concerning a roofing project to be performed on Highland High School, Salt Lake City, Utah.

Plaintiff initiated its complaint against defendant on February 5, 1975 alleging that defendant wrongfully removed the plaintiff from the Highland High School roofing project. Plaintiff sought damages in the amount of $19,765. (R., pp. 2-4).

Defendant answered plaintiff's complaint and alleged that plaintiff failed to complete the project in compliance with the agreements, standards and specifications of the project and failed to perform in an expeditious and workmanlike manner (R., pp. 14-16).

On April 27 plaintiff responded to defendant's request for admissions and at that time stated that the original written contract entered into between the parties had been modified by an oral agreement. (R., p. 40).

Trial was commenced before a jury on May 9, 1977 with the Honorable Ernest F. Baldwin, Jr. presiding. Much of the testimony and many of the exhibits were undisputed. The following is a synopsis of the undisputed facts and evidence pre-

at trial.

On June 17, 1974 the Salt Lake City School District sent to plaintiff roofing company a request to bid for several school buildings in the Salt Lake City District. (Exhibit 1-P). Subsequently, plaintiff submitted its bid for the Ensign School, Highland High School, and Uintah School. (Exhibit 6-P). On July 9, 1974 plaintiff was awarded the contract and purchase orders were accordingly issued. (Exhibit 7-P, 8-P, 9-P).

At the time of the bid and at the time of the subsequent acceptance the district had issued "basic specifications for re-roofing" concerning the standards to be utilized by the roofing contractor during the projects. (Exhibit 3-P). Paragraph 11 of the specifications stated:

> Protection of building from water damage: During all stages of the project, care must be exercised to prevent damage to rooms and corridors below and the building proper. No roofing material shall be applied over damp felts. At the end of each working day the roof shall be sealed to prevent water damage to the building and its contents.

Plaintiff did not receive authorization to proceed on the project until August 19, 1974 when it was decided by the Board of Education that insulation would not be purchased and added at the time the roofing job was performed. A letter was sent to plaintiff advising it to proceed as originally

planned. (Exhibit 11-P; Tr., p. 12).

Plaintiff began working on the project on a small lower area of the building. (Tr., p. 13). Subsequently, in October of 1974 it was decided that additional insulation should be replaced and the Board of Education authorized the expenditure of additional money for this insulation. An addition $21,804 was thereby added to the original contract of $29,8 making the total cost of the project $51,604. (Exhibit 13- Tr., p. 15).

Walter A. Jensen, the Board's inspector, checked on the progress of the project almost every day. (Tr., p. 77). On October 17, 1974 Jensen had a conversation with several of plaintiff's employees concerning the procedure which plaintiff wished to utilize. (Tr., pp. 77, 95). At that time Ken Bil informed Mr. Jensen that he wished to tear off a large area of the roof rather than working on small portions each day for the purpose of speeding up the project. He informed Jensen that he would obtain a large crew from a local church to assist him. (Tr., pp. 82, 96-97). Jensen was informed at that time that visqueen plastic would be kept on hand to cover the area. (Tr., p. 97). For the next five days the crews proceeded to tear off the old roofing material until approximately 44 squares (each square is 100 square feet) had been removed. (Tr., p. 96).

Plaintiff's own witnesses testified that the roof was not "sealed" at the time the first rainstorm occurred. Russel Bills, brother of the owner Ken Bills, testified that prior to the storm the roof was left wide open. (Tr., p. 99). He further testified that on the morning of the storm the roof was covered with visqueen but was not sealed. (Tr., p. 103). Scott Bruderer, an employee of plaintiff, testified that the roof was not sealed but could have been with tar and paper prior to the rainstorm but such procedure would have taken time and would have been expensive. (Tr., p. 111).

Donald Bills, brother of Ken Bills, testified that visqueen was not water tight and could not be used to seal the roof. Finally, Kenneth Bills, the president of the plaintiff roofing company testified that three days prior to the first rainstorm the roof was not sealed and that rain was subsequently able to get through the visqueen. (Tr., pp. 196-197).

Carl Paulsen, a contractor involved in the roofing business since 1955, testified in the roofing business the word "seal" means to join the new roof to the old roof in such a manner that it is absolutely water-tight. He further stated that it was the custom of all builders in the industry to seal the work as it was being done. (Tr., pp. 299-300).

On the night of October 20 one of plaintiff's employees noticed a light rain beginning and contacted other employees

of plaintiff who then converged upon the school roof and put the visqueen plastic over the exposed areas. (Tr., p. 107). The next morning, October 21, 1974, water had penetrated the visqueen plastic and was flooding into the third story school rooms. (Tr., pp. 108, 226). Ceiling tiles were soaked and falling off the ceiling, wood paneling was wet and buckled and seal brick was peeling. (Tr., p. 212). The water continued to leak into the classrooms for several days thereafter. (Tr., p. 236). Throughout the next two weeks it frequently rained and on several occasions water leaked heavily into the school. (Tr., pp. 46-47, 227). Some of the classrooms were moved to other areas of the building for a two-week period. (Tr., p. 238).

At various times after the initial October 21 leakage employees of plaintiff worked upon the roof. On November 5, 1974 a letter was sent by Mr. Bruce Ririe to plaintiff outlining the school district's dissatisfaction with plaintiff's work and informing plaintiff that the contract would be cancelled "unless the new roof is installed where the old was torn off and the roof leaks caused by your crews repaired by Saturday, November 9, 1974 so there is no further water damage inside the building". (Exhibit 19-P). The roof was finally sealed on November 11 but was not completed until the first week in December.

On approximately the 10th of November Mr. Ririe informed Kenneth Bills that he was terminating the contract but that he would pay them for everything that had already been done including all materials on the job. (Tr., p. 172). On November 25, 1974 plaintiff sent a bill to defendant school board requesting a balance due of $18,916.00. (Exhibit 22-P). Defendant responded to this letter with his own calculations showing a balance to be paid of $9,378.00. (Exhibit 26-P).

Several areas of dispute arose in the lawsuit. One of these areas concerns the number of square feet actually worked upon by the plaintiff and the cost involved in the project. Because appellant is not raising the determination of damages as error testimony concerning damages will be omitted.

The main issue in dispute was whether the conduct of defendant's agents waived the requirement of sealing the roof.

It was plaintiff's theory throughout the trial that the school board's building inspector and director of buildings and grounds were aware that an extremely large amount of the roof would be uncovered at a time but agreed to the procedure in order to expedite the project. Russell Bills stated that he informed Mr. Jensen, the defendant inspector, of the proposed plan and that Jensen "told us that it would be all right to tear it off and to go ahead without covering it each night". Bills told Jensen that visqueen would be available if neces-

sary to cover the area. (Tr., p. 97). Donald Bills also stated that Jensen agreed that because of the slowness in normal procedures it would be all right to tear out the large area as long as there was material to cover the roof availa (Tr., p. 116).

Ken Bills stated that around the 6th or 7th of October visited Mr. Ririe in his office and told him that the work would be a lot faster if large sections could be torn off and reroofed as a whole. (Tr., p. 151). Bills stated that Ririe told him that if the visqueen was on the project that the pla would be all right. (Tr., p. 164).

Defendant's witnesses testified quite differently. Mr. Ririe testified that he never authorized his inspector, Mr. Jensen, to waive the requirement of sealing the roof and that no one under his position had any authority to waive this provision. He further stated that any waiver of a departmental provision issued by the Board of Education would have to come through him personally and that no such waiver was ever received. (Tr., pp. 44-45).

Mr. Ririe could not recall ever talking to Ken Bills about the proposed mass assault on the building and stated that the first time he heard about the project and the use of visqueen was when his inspector told him that he was opposed to using it. This occurred around the 18th or 19th of October. (Tr., p. 246).

He further testified that he was skeptical about the use of visqueen and told Jensen to inform plaintiff that a better solution had to be found since he did not think it could be sealed effectively. He told Jensen to inform the contractor that the building had to be protected. (Tr., pp. 247-249). He stated that he had the power to modify the type of material and dates of completion but could not modify increase in prices or protecting of the buildings. (Tr., p. 250).

Walter A. Jensen, supervising inspector of the maintenance of the defendant school district, testified that he was told by Mr. Bills of the proposed plan to rip off a large area of the roof in order to expedite the project. He testified as follows:

> So I said, well, that the responsibility is yours, in effect not the exact conversation, I said you can't open that much roof off and leave it open, you've got to seal it, you've got to cover it and in our discussion I proposed it first that he put on two plys of asphalt and membrane to seal it and both of us were aware that that was a costly procedure to do and he said, well, we are insured. I said I don't want any hassle with insurance companies or anyone else, I don't want any water getting through the roof. (Tr., p. 82).

Jensen further told Bills that the use of visqueen would be risky because any perforation in the plastic would cause a

leak and additionally the wind was powerful in that area and could easily blow it off. Finally, he suggested that Bills contact other roofers in the area as to what procedure to use. Jensen testified that he thought Bills' suggestion was merely a proposal that would be examined and submitted to Mr. Ririe before it was actually undertaken. (Tr., p. 84). He did not again see Ken Bills until after the storm. (Tr., p. 84).

Subsequently on the 17th of October he had a discussion with Don Bills concerning the open roof. Bills told him that a storm was forecast for Tuesday and Jensen told Bills he had better get it sealed up. Jensen stated that he gave him no instructions because it was the contractor's responsibility and how he accomplished it was his business as long as he met the requirement of keeping the building safe. (Tr., p. 273).

Ken Bills substantiated this statement and agreed that he was never told by anyone that he was not responsible for preventing water from entering the building. (Tr., p. 192).

Finally, Russell Bills testified that he considered it his responsibility to prevent the elements from getting into a building and that it was a necessary workmanlike procedure to protect a building. (Tr., p. 101).

In the beginning of the trial plaintiff's attorney urged that conversations with the building inspector and Mr. Pirie

were admissible because they went to a modification of the written contract. Defendant's counsel had previously objected that such conversations were irrelevant in that they violated the parol evidence rule and attempted to modify the contract. (e.g. Tr., p. 165). The trial court rejected this modification theory. (Tr., pp. 305-306). In a discussion by the Court with counsel the first concept of waiver was suggested by the Judge. (Tr., pp. 159-160). Throughout the proceeding defendant's counsel argued that there was no notice given to defendant of any waiver theory prior to the middle of the trial. (Tr., pp. 306, 324).

Before submission of the case to the jury defendant moved for a directed verdict on the grounds that plaintiff's failure to seal the roof and the subsequent delay was a material breach of contract as a matter of law. (Tr., p. 307). The Court took the motion under advisement. (Tr., p. 314).

Special interrogatories were submitted to the jury of which the first question asked the following:

> Did the actions of the plaintiff in late October and early November of 1974, in removing a portion of the roofing on Highland High School, and the manner in which it was left, constitute a material breach of the contract between plaintiff and defendant?

The jury answered "no". (R., p. 130).

A judgment was entered by the trial court pursuant to

the verdict on May 23, 1977 together with the following additional finding:

> In addition to findings of the jury as above set forth, the Court made the following findings based upon the undisputed evidence at trial:
>
> (1) The actions of the defendant in late October and early November of 1974, in removing plaintiff from the Highland High School project and thus preventing it from completing the contract, constituted a breach of the contract between plaintiff and defendant. (Tr. pp. 140-141).

On June 22, 1977 the trial court denied defendant's motion for directed verdict, for a judgment notwithstanding the verdict and for a new trial. (R., p. 148).

On July 21, 1977 this appeal was filed. (R., p. 152).

ARGUMENT

POINT I

> THE TRIAL COURT ERRED IN FAILING TO RULE AS A MATTER OF LAW THAT PLAINTIFF BREACHED ITS CONTRACT WITH DEFENDANT.

The development of this lawsuit can be simply stated: Plaintiff sued defendant for breach of contract alleging defendant had wrongfully terminated plaintiff from the roofing project and asked damages for the profits it would have received had the contract been completed.

Defendant school district answered this claim by alleging that it was justified in terminating the contract becaus

of the breach committed by plaintiff in its failure to properly seal the roof as required by the specific contractual provision and its subsequent failure to protect the building as was also required by the contract.

Finally, plaintiff attempted to counter this defense on two theories. In the beginning of the trial, plaintiff urged that the contract had been orally modified by the actions of the defendant's agents. After this theory was rejected by the trial court a new theory was suggested by the court to plaintiff's counsel that the contractual provisions regarding sealing and protection of the building had been "waived" by the defendant and therefore it was unable to claim a breach under the sealing provision of the original contract.

As to the question of whether defendant breached its contract by termination the trial court found that based upon undisputed evidence at trial the termination of plaintiff roofing company constituted a breach of the contract. This conclusion of law by the trial court was correct since a repudiation is necessarily a breach of contract.

However, if plaintiff had materially breached its contract by failing to seal the roof then the defendant school district was discharged from performing its obligation under the contract and its breach was therefore excused. Restatement of Contracts, §397, p. 750.

Despite repeated assertions by defendant that this second question of plaintiff's breach could be decided by the court as a matter of law the issue was submitted to the jury by special interrogatories. (R., p. 130). The trial court erred in submitting this question to the jury since the facts relied upon by defendant to justify plaintiff's breach were equally undisputed as in the instance of facts relied upon for defendant's breach. The only question before the trial court was whether the provision of the contract requiring sealing of the roof and protection of the building had been violated. This was clearly a question of law before the court and it was therefore error to submit this legal question to the jury.

The rule delineating the role of a judge and jury has been stated as follows:

> The question of what facts will constitute a breach of contract is one of law to be determined by the court, but whether such facts have occurred is ordinarily a question of fact to be determined by the jury. Thus, when the facts are undisputed, the question whether there has been a performance or a breach of the contract is one of law for the court. 17A C.J.S., Contracts, §630, p. 1266. (Emphasis added).

This Court in Avgikos v. Lowry, 179 P.988 (Utah, 1919) applied this rule in a case involving the question of whether a supplier had substantially complied with the quantity of

goods agreed to in a contract. This court stated:

> Where the facts are undisputed, the question of whether or not they constitute a performance or a breach of the contract is one of law for the court. Id. at 990.

This Court concluded, "It was error to submit the question to the jury, on the allegations and the facts as they appear, as to whether there had been a compliance with the contract." Id. at 990.

It is a well-settled rule of construction that where the terms of the contract are not in dispute, the language is clear and unambiguous, and the facts and circumstances are not disputed, construction of the contract is a question of law and the question of whether the facts constitute performance under the contract is also a question of law for the court. Brown-Crummer Inv. Co. v. Koss Const. Co., 4 F.2d 682 (8th Cir. 1925). It is universally held to be error to submit the construction of a written contract to a jury. Hewitt v. Buchanan, 4 S.W.2d 169 (Ct. Civ. App. Tex. 1927).

The standard of appellate review in a case such as this has been stated by the court of appeals of Arizona in Kammert Bros. Enterprises v. Tanque Verde Praza Co., 420 P.2d 592 (Ariz. App. 1966). The court stated:

> In a breach of contract case, the burden of proof is on the plaintiff to plead and prove a breach. The question of whether a contract has been breached is ordinarily a question for the jury, but, if the undis-

> puted material facts in the case, together with evidence taken most favorably to support the judgment below established that a judgment other than that rendered below is mandated by applicable law, the appellate court should set aside the lower court's judgment and enter the appropriate judgment. Id. at 603.

In the instant case the contractual provision upon which defendant school district relied in its repudiation of the contract is clear and undisputed. This provision stated:

> In all stages of the project, care must be exercised to prevent damage to rooms and corridors below and the building proper. No roofing material shall be applied over damp felts. At the end of each working day, the roof shall be sealed to prevent water damage to the building and its contents. (Ex. 3-P). (Emphasis added).

There is no ambiguity or doubt that the word "seal" means that the roof was required to be watertight. The meaning of plain and ordinary words in common use is a question of law for the court. 17A C.J.S., Contracts, §620, p. 1259. Employees of the plaintiff admitted throughout the trial that the roof was not sealed at the time of the rainstorms and that 44 squares which consisted of 4,400 square feet were left "unsealed". (pp. 99, 103, 111, 124, 196).

Thus as a matter of law plaintiff breached its contract by failing to seal this large area and exposing the building to water damage. In addition, it is undisputed that this condition continued for over two weeks with constant flooding

the school premises.

The conduct of plaintiff in violating the provisions of the contract and in repeatedly failing to protect the building after the initial flooding occurred was a material breach from plaintiff's obligation which justified defendant's termination from the project. Not only was that portion of the building which had already been worked on in jeopardy but in addition the remaining three-fifths of the project could have also been jeopardized by plaintiff's unprofessional conduct.

Any owner of a building whether it be a school or a home should expect a roofer to protect his premises from damages and should not be expected to continue a relationship with a roofer which has caused damage to a building, disrupted the use of the building, and who has taken no steps to adequately insure that future damage will not occur before the final roofing can be applied. As a matter of law under circumstances such as this and under clear contractual obligations a trial court or appellate court must rule that a material breach has indeed occurred. Voith v. Knapp-Stiles, Inc. 139 N.W.2d 781 (Ct. App. Mich. 1966).

The only remaining question in this case is whether the material breach by plaintiff could be excused because of a waiver by defendant's agents. If such waiver did in fact occur defendant's justification for terminating plaintiff

would be eliminated and the material breach would be of no effect. 17 Am.Jur.2d, Contracts, §390, p. 835. As will be discussed in the next section, however, the issue of waiver was not properly raised nor was there sufficient evidence to show that any of defendant's agents who allegedly waived the contractual provision of sealing had such authority.

POINT II

THE TRIAL COURT ERRONEOUSLY ALLOWED PLAINTIFF'S CLAIM OF WAIVER TO BE PRESENTED BEFORE THE JURY AND ERRONEOUSLY INSTRUCTED THE JURY.

As previously stated the question of waiver only becomes relevant when it is determined that plaintiff breached its obligation under the contract thereby justifying defendant in terminating plaintiff from the project. The theory of waiver was created during the second day of trial. A review of the record unquestionably shows that even plaintiff's attorney at the time of trial did not intend to rely upon a waiver theory. Rather, plaintiff believed that the actions of defendant's agents had modified the original contract and argued this theory to the court. It was not until the trial judge himself suggested waiver that the theory entered the trial. (Tr., p. 159).

In spite of defendant's continued objections, testimony concerning the conversations with defendant's inspector and director of buildings and grounds was admitted before the

Testimony concerning alleged waiver of the contract provision was prevalent throughout the entire trial. Defendant's counsel objected throughout the trial that waiver was improper because it was not plead, no authority to waive had been shown, and it was a surprise to him since he was not prepared on this issue. (Tr., pp. 310-311, 315, 325, 162). This Court has repeatedly held that notice must be given to a party of the issues raised and they must be given an opportunity to meet them. Cheney v. Rucker, 381 P.2d 86 (Utah 1963).

In conference with the court, defendant's counsel argued that waiver was improper since there was no showing that either Mr. Jensen or Mr. Ririe could waive the provisions of the contract. The trial court gave his opinion that such authority may be possible and then stated it was a matter of law to tell the jury. (Tr., p. 161). The jury was never told anything about authority.

Throughout the record there is no showing whatsoever that either one of these agents had authority to waive the contractual requirements entered into between the Board of Education and plaintiff. Mr. Ririe repeatedly stated that he received no authorization from the school board to waive the provision. (Tr., pp. 45, 250-251). Ririe also testified that Jensen could only make statements modifying any procedure after it had been cleared through him. (Tr., p. 56). Jensen substan-

tiated this statement and testified that he could not vary the terms of any contract including the sealing provision. (Tr., p. 88). Even the trial court stated to plaintiff's attorney that proof of authority was necessary. The court said, "These oral modifications on the job you are going to have to prove his authority from the school board because the school board is a body politic and just not every Tom, Dick and Harry that gets out on a job has got authority to do it." (Tr., pp. 154-155).

Thus, the record is void of any affirmative evidence showing that Jensen or Ririe had authority from the school board to waive the sealing provisions even if it were assumed that they made such statements. It was plaintiff's burden to show such authority if the doctrine of waiver was to be presented at trial. 92 C.J.S., Waiver, p. 1066. To constitute a waiver there must be a clear statement of the intention of the party to relinquish a right and that statement must be made by an agent having the authority to give such a waiver. Public Warehouses of Matanzas v. Fidelity and Deposit Company, 77 F.2d 831 (2nd Cir. 1935).

This Court in Campbell Building Company v. State Road Commission stated a rule applicable to this public institution. This Court said:

> Any person doing business with the state by way of contract or otherwise must take

> notice of the limitations on the authority of the officers or agents of the state, since they may act only within the scope of their lawful powers. A state road engineer cannot waive a provision in the contract that extra work, before it can be paid for, must have been authorized and the prices fixed by a work order in writing. 70 P.2d 857, 865 (1937).

The rule is universal that the power to execute a contract or agreement does not grant authority to vary the agreement after it has been executed, nor is the power to vary an agreement after execution inferred from a general power to make it. Ordinarily, the authority to make a contract does not authorize an agent to waive its conditions or otherwise diminish or discharge the obligations of the third person. 3 Am.Jur.2d, Agency, §85, pp. 488-489.

Therefore, neither the facts of this case nor the law would have supported submission of waiver to the jury since plaintiff failed in its burden of proof showing the elements necessary before waiver can be considered. The jury was accordingly never asked to decide any specific question of whether the conduct of defendant's agents had waived any material breach which may have occurred.

As stated supra it was error for the question of material breach to be submitted to the jury. Assuming arguendo, however, that such submission was proper, the trial court still committed prejudicial error when it submitted an instruction

on waiver to the jury where no question of waiver existed.

The court instructed the jury as follows:

> A default in the performance of a contract may be waived. Under ordinary circumstances where there is an existing actual breach of contract of a character going to the essence, the innocent party will, if he insists on performance notwithstanding the breach, keep alive his own obligation to continue with performance, with the result that the party at fault, even though having in the interval done nothing in reliance on a continuance of performance, may, if he sees fit, turn about and hold the innocent party to perform. In other words, a party may waive a breach by the other party and then be liable for his own subsequent breach.
>
> Although intent is necessary to effect a waiver of a breach of contract, it need not be shown by direct evidence; but if it appears to exist so as to mislead the adversary, it works an estoppel. (Instruction No. 14, Tr., p. 100).

The effect of this instruction could only be to confuse the jury into thinking that the discussions concerning the waiver had a direct effect upon whether a material breach had been committed by plaintiff as was requested in Interrogatory No. 1. (R., p. 130).

The Supreme Court of New Mexico in reversing a judgment based upon a similar type of instruction stated:

> The purpose of instructions is to enlighten the jury. The instructions should call the attention of the jury to the specific issues which it must determine and should embrace only statements of law to be applied in the

> examination and determination of the issue. No statement shall be included in any instruction which is likely to confuse or mislead any member of the jury. Embrey v. Galetin, 418 P.2d 62 (N.M. 1966). See also Lund v. Mountain Fuel Supply Company, 365 P.2d 633 (Utah 1961).

The defendant-appellant submits that the giving of instruction 14 allowed the jury to conclude that waiver was an integral part of determining a material breach. The jury could have concluded that the statements purportedly made by Mr. Jensen and Mr. Ririe approving the procedure eliminated any material breach which had existed under the terms of the contract. The error with this assumption is that plaintiff failed to show any authority of Mr. Jensen or Mr. Ririe to waive the provisions and so any decision by the jury based upon waiver was improper since the issue, as a matter of law, could not be considered by the jury because of plaintiff's failure to prove authority.

The jury was thus prohibited from answering a specific question on waiver but was instructed erroneously as to the elements of waiver and the effect of waiver even though this issue was not properly before the jury. This allowed prejudicial evidence which was legally insufficient to influence the decision of the jury in its conclusion that a material breach had not occurred.

It is apparent, therefore, that the issue of waiver was

extremely prejudicial to defendant in that it was: first, not properly plead so that defendant had notice of the defense; second, witnesses were allowed to testify as to waiver with no proof offered by plaintiff that such witnesses had authority to make any waivers; and third, an instruction concerning waiver was given to the jury which could have no effect but to confuse them and to apply waiver erroneously in determining a material breach.

SUMMARY

This action involved a complicated series of claims for breach and excuses and justifications. The trial court failed in its duty to separate these issues and to allow the jury only to decide legitimate questions of fact supported by substantial evidence.

The trial court was obligated as a matter of law to find that plaintiff had materially breached its contract with defendant by failing to properly seal the roof and by allowing water damage to occur over a long period of time. It was error to submit this issue to the jury.

Had this been done, the question of waiver could have been decided in a logical manner. The court, on the conclusion of the case, could have decided whether there was substantial evidence to show that defendant's agents had authority to make any claimed waivers. If such evidence existed the

trial court could submit the question of waiver to the jury for its factual determination. If such authority did not exist then the issue of waiver was void and a verdict could be directed in favor of defendant.

Instead, the trial court refused to rule upon the question of plaintiff's breach and submitted it instead to the jury. The court allowed evidence of waiver into the trial throughout the proceedings and then instructed the jury as to waiver although no specific question was before the jury.

This procedure denied defendant the right to receive a ruling as a matter of law that plaintiff had breached its contract and instead forced the defendant to argue this complicated issue before the jury. In addition, this procedure allowed the jury to hear legally insufficient evidence as to waiver and yet use this evidence in deciding material breach.

For these reasons, defendant requests this Court to hold as a matter of law that plaintiff materially breached its contract with defendant by failing to comply with the contractual provisions and to rule that the evidence presented at trial is insufficient for submission of waiver to a jury thereby mandating a judgment in favor of defendant.

In the alternative, defendant would request a new trial be granted and that guidelines be issued as to the proper procedure which the trial court should follow in separating

the various theories and defenses.

Respectfully submitted,

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